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No. 93-353

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

FELTON HALE AND RICHARD S. BERRY,

Petitioners,

v.

STATE OF ARIZONA, et al.,

Respondents.

and

JOHN LEROY FULLER, et al.,

Petitioners,

v.

STATE OF ARIZONA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

1. There is no Square Inter-circuit Conflict.

Petitioners argued that the opinion below raises an inter-circuit conflict with the Second and Fifth Circuit's decisions in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984) and *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). A close reading of these two cases discloses no square conflict. Both *Carter* and *Watson* involved prison inmates who worked for outside employers; the teaching for a community college in *Carter* and working for a private contractor in *Watson*. Thus the inmates in *Carter* and *Watson* did not work for the prison itself nor a state entity such as ARCOR. The court in *Carter* concluded that Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* may apply to the plaintiff vis-a-vis the outside employer, Dutchess Community College, and remanded the case for a factual finding. In *Watson*, the court concluded that the private contractor was an employer of prisoners not sentenced to hard labor and were on work release. The opinion below took pains not to create a conflict with *Carter* and *Watson*. 993 F.2d 1387, 1393 (9th Cir. 1993). (Pet. App. 12a.) The Court emphasized that this case concerned "inmates working for a prison, in a program structured by the prison pursuant to a state law requiring prisoners to work at hard labor . . . ". *Id.*[1]

Clearly, there is a great difference between prisoners working for outside employers and prisoners who work

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[1] *See also Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993) *Petition for cert. filed* (No. 92-5298).

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[1] *See also Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993) *Petition for cert. filed* (No. 92-5298).

for prison industries within the fabric of a state prison system.

Most importantly, neither *Carter* or *Watson* mentioned or discussed the Ashurst-Sumner Act, 18 U.S.C. § 1761. That Act prohibits the transportation of prison-made goods in interstate commerce, with a number of exceptions. When that Act is put in the equation:

> [I]t is difficult to imagine that Congress would have enacted Legislation in 1938 that rendered its recently passed prison-made goods law essentially superfluous (for the FLSA, so construed, would have addressed the problem of unfair competition from cheaply made goods by eliminating the low-labor-cost advantage.)

993 F.2d at 1397, Pet. App. at 21a, quoting *Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1303 (1993). *See also Harker v. State Use Industries*, 990 F.2d 131, 134 (4th Cir. 1993). *Petition for cert. filed* (No. 92-5298).

In the interpretation of the interaction between FLCA and the Ashurst-Sumner Act, all three circuits (4th, 7th and 9th) which have passed on this issue are in agreement.[2]

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[2] Although consideration of the Ashurst-Sumner Act in connection with FLSA would have improved the analytical framework in *Watson*, the result in *Watson* most likely will be the same. 18 U.S.C. § 1761(a) specifically exempts "convicts or prisoners, on parole, supervised release, or probation," from its coverage. Work release or furlough is the same as supervised release. *See e.g.* A.R.S. §§ 31-333, 31-233C.

Petitioner argued that since this Court held in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) that the Walsh Healey Act did not preclude the application of FLSA, the Ashurst-Sumner Act should be treated likewise. That comparison is flawed. In *Powell*, this Court found that although the Walsh Healey Act and FLSA overlapped, they were not mutually exclusive. *Id.* at 519. FLSA and the Ashurst-Sumner Act, however, are mutually exclusive. The Ashurst-Sumner Act criminalizes the transportation of prison-made goods in interstate commerce. That paramount purpose cannot be reconciled with the notion that Congress also intended that prisoners who made the contraband must nevertheless be paid the minimum wage so that their prison-made goods could compete fairly in interstate commerce. Moreover, the 1979 amendment to the Ashurst-Sumner Act which created pilot projects and the inmate wage requirements for those pilot projects demonstrate that Congress, in enacting the amendment, intended that these provisions govern prison-made goods and not FLSA. Justice System Improvement Act of 1979 § 827(a), 83 Stat. 1215 (1979) (codified as amended at 18 U.S.C. § 1761(c)(1992)). The court of appeals correctly observed that the Ashurst-Sumner Act is not "mutually supplementary" to FLSA. 993 F.2d at 1397-98 n.18. (Pet. App. p. 22a.)

2. The Department of Labor's Interpretation is Not Inconsistent With the Opinion Below.

Petitioners cited two letters by administrative officials in the Department of Labor for their contention that the Fourth and Ninth Circuit's rulings will result in non-

uniform application of FLSA to prisoners. The first letter (by Herbert J. Cohen) concerned a contract between an outside employer and the prison which provided the prison inmates for the work. Citing *Carter*, the letter concluded that FLSA applied to that situation. The second and more recent letter (by Darrel F. Sweeney, Jan. 21, 1993), stated:

> It is the position of the Department that a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the FLSA. Therefore, such workers are not covered by the FLSA and would not have to be paid in accordance with its monetary provisions.
>
> A different situation exists when inmates are contracted out by an institution to a private company or individual. * * *

Pet. App. at 105a.

The Cohen and Sweeney letters are not inconsistent with the decision below. The court of appeals did not hold that prisoners who were contracted out to private or outside entities are not employees of these entities. It specifically stated:

> While we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case, who worked for programs structured by prison pursuant to the state's requirement that prisoners work at hard labor, are not "employees" of the state within the meaning of FLSA.

993 F.2d at 1389, (Pet. App. at 4a).

The Cohen and Sweeney letters are consistent with Arizona law. Arizona Revised Statutes (A.R.S.) § 31-254A requires that prisoners who work for private entities under contract with the state, be paid at least the minimum wage.[3] Moreover, neither letter mentioned the Ashurst-Sumner Act. Therefore, the implication suggested by the Petitioners that the agency perceived no conflict between FLSA and the Ashurst-Sumner Act was unwarranted. The probable reason for that omission is that two of the three decisions concerning the interaction between the two statutes postdated the Sweeney letter (the most recent of the two letters). The *Vanskike* opinion, although decided in 1992, was so recent that it most likely escaped the attention of agency officials in January of 1993.

3. The Opinion Below Does Not do Violence to FLSA's Central Aims.

The Petitioners conceded that Arizona's program received a certificate of compliance under 18 U.S.C. § 1761(c), but argued that the opinion below does violence to one of FLSA's central aims because "it is undisputed that the prisoners who worked in that program were not paid the minimum wage." That assertion is off the mark. Many of Arizona inmates were paid above the minimum wage when working for private entities. *Work*

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[3] A.R.S. § 31-254A provides that "[i]f the director [of the Department of Corrections] enters into a contract pursuant to § 41-1624.01 with a private person, firm, corporation or association the compensation shall be as prescribed by the person, firm, corporation or association but shall not be below the minimum wage.

in American Prisons, The Private Sector Gets Involved, U.S. Dept. of Justice, National Institute of Justice, May 1988, at 27-28.

By Congressional design, the important field of training and rehabilitation of prison inmates and the incidental production of goods which enter into interstate commerce, was entrusted to the Department of Justice and its Bureau of Justice Assistance.[4] The fact that some prison programs operate in violation of the Ashurst-Sumner Act does not mean that FLSA should come into play. Whether or not there is perfect compliance with the Ashurst-Sumner Act has no bearing on FLSA's non-application. Even if some of the non-complying programs were to pay FLSA's minimum wage, these programs would still be in violation of the Ashurst-Sumner Act and be subject to criminal prosecution under that Act. On the other hand, compliance with the Ashurst-Sumner Act and its prevailing wage requirement would level the playing field because prevailing wages paid would generally be more than FLSA's minimum wage.

4. The Implication That Arizona Inmates Employed by Best Western International Were Not Paid the Minimum Wage is Untrue.

Petitioners argued that "one Best Western International, Inc. reservation center staffed by Arizona inmates

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[4] The creation of prison industries was due, in part, to former Chief Justice Burger's calling for "factories with fences." Burger, Warren E. *"More franchises, or Factories With Fences,"* New England Journal of Prison Law, Vol. 8, No. 1, Winter, 1982, pp. 111-20, and Burger, Warren E. *"The Need for Changes in Prisons and the Correctional System."* Arkansas Law Review, Vol. 38, 1985, pp. 711-26.

handled 2.5 million calls, representing $72 million in room reservation sales." Petition at 19. Petitioners then stated that "Trans World Airlines reservation system operated at a California correctional facility handled approximately $1 million in airline ticket sales." The paragraph was followed immediately by the paragraph which stated: "Paying sub-minimum wages to inmate workers at prison-based businesses that offer goods and services in interstate commerce inevitably gives rise to unfair competition that is harmful to private sector business and the employees of those businesses."

These two paragraphs when read together clearly implied that the inmates who worked for Best Western international and Trans World Airlines were not paid the FLSA minimum wage. That implication is untrue. Surprisingly, the source from which Petitioners cited and obtained their information concerning both Best Western International and Trans World Airlines prison programs, *Work in American Prisons, The Private Sector Gets Involved*, stated:

> Starting salaries are the same as those for reservation agents at the main center: $4.50 per hour, with an increase of up to 12 percent after nine months. Employees at ACW [Arizona Center for Women] are subject to the same policies and procedures as all Best Western employees, including those governing disciplinary actions and job requirements. Each ACW employee, in addition to paying federal, state and social security taxes, contributes 30 percent of her net wages to offset the cost of incarceration.

Id. at 28.

Trans World Airlines' California prison employees were paid $5.67 per hour. *Id.* at 30.

The $4.50 per hour wage received by Arizona inmates was considerably more than the FLSA minimum wage of $3.35 per hour in effect throughout the 1980's. Another Arizona prison work program also paid more than the FLSA minimum wage. *Work in American Prisons. The Private Sector Gets Involved,* at 27 (Wahlers Manufacturing Company's joint project with ARCOR). Under Arizona law, A.R.S. § 31-254A, all inmates who worked for Best Western International or other private entities were paid at least the FLSA minimum wage.

It is unfortunate that the Best Western International's program had been singled out by the Petitioners. That program was hailed by the Department of Justice as "one of the most positive illustrations of the potential of private sector employments of inmates." *Work in American Prisons, The Private Sector Gets Involved,* at 28.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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